

***United States Court of Appeals
for the Second Circuit***



APPENDIX

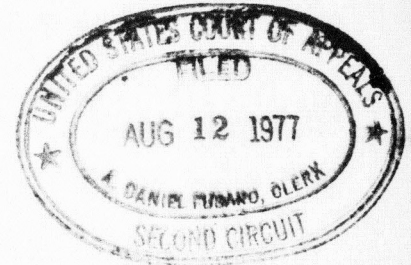
77-1267

To be argued by
STEVEN LLOYD BARRETT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
-against-
ZALMON SCHNITZER,
Defendant-Appellant.

B
MS
Docket No. 77-1267



APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

MARTIN ERDMANN, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

STEVEN LLOYD BARRETT,
Of Counsel.

PAGINATION AS IN ORIGINAL COPY

U.S. TITLE/SECTION 18:201(b),285
OFFENSES CHARGED Did knowingly & wilfully conspire to defraud the U.S. by aiding to obtain the payment of a false claim
2
SUPERSEDING COUNTS

BAIL • RELEASE
AMT Fugitive
Denied Sat Pers. Recog
LPSA
\$ 000
Date
10% Deposit
Surety Bond
Collateral
3rd Pry Cust
Other
Bail Not Made
Status Changed (See Docket)

II. KEY DATES & INTERVALS
ARREST or U.S. Custody Began 8/10/76
High Risk Date
Indictment Information 7/27/76
Indict. Waived
Superseding Indict/Info
In Charging District
ARRAIGNMENT 8-10-76
1st Plea II
Final Plea
Trial Set For 9-13-76
Vair Dire
Trial Began
Trial Ended
NG G NOL
G. Plea W/Drawn
NG G NOL

SENTENCE
Disposition of Case
On All Charges
On Lesser Offense(s)
WOP
WOP
On Government's Motion

MAGISTRATE		DATE	INITIAL/NO.	INITIAL APPEARANCE DATE	INITIAL/NO.	OUTCOME:
Search Warrant	Issued			PRELIMINARY EXAMINATION		DISMISSED
	Return			OR		HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT
Summons	Issued			REMOVAL HEARING		HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW
	Served			WAIVED NOT WAIVED		
Arrest Warrant Issued				INTERVENING INDICTMENT		
COMPLAINT						
OFFENSE (In Complaint)						

U.S. Attorney or Asst. Charles Clayman
ATTORNEYS Defense: Michael Asen, Legal Aid Society
15 Park Row, NYC. 10038
374-1737

LEONARD D. FORTGANG 1		PROCEEDINGS	EXCLUDABLE DELAY
DATE	(DOCUMENT NO.)		(a) (b) (c) (d)
7/27/76		Before DOOLING, J.- Indictment filed.	
7/27/76		By DOOLING, J. - Bench warrant ordered.	
8-4-76		Before MISHLER, CH J. - case called - deft not present - counsel not present	
8-10-76		Before MISHLER, CH J - case called - deft present without counsel-court appointed Legal Aid as counsel for the deft - Interpreter Jack Weiss present - deft arraigned and enters a plea of not guilty - Bench Warrant vacated - Bail set at \$10,000 P/R Bond - defts father to sign as surety - 9-15-76 for trial.	
8-10-76		Financial Affidavit filed.	
8-11-76		By Mishler, Ch J - Order filed appointing counsel for deft.	
9/7/76		Letter to Judge Mishler from Charles E. Clayman AUSA dated 9/2/76, filed.	
9-13-76		Before Mishler, Ch J - case called - deft & atty present - Interpreter Susanna Tuchmajer present - adjd without date for pleading on the superseding indictment. (to be forthcoming)	

DATE	IV. PROCEEDINGS (continued)	PAGE TWO	V. EXCLUDABLE DELAY			
			Unrecorded and Undated (a)	Short Date and Date (b)	Ly. Code (c)	Total Excl. (d)
1/1/76	Letter filed dated 11/30/76 to Judge Mishler from deft requesting a prompt date for trial.					
12-6-76	Letter filed received from Chambers from counsel Michael Asen dated Dec. 1, 1976					
12-27-76	Stenographer's Transcript dated September 13, 1976 filed.					
1/7/77	Before MISHLER, CH. J.- Case called. On motion of AUSA Clayman, the indictment is dismissed.					
1/7/77	By MISHLER, CH. J. - Order of dismissal filed.					
1-10-77	Notice of motion filed for the return of all photographs and fingerprints taken etc.(forwarded to Chambers)					
1-17-77	Affidavit in opposition to motion to expunge filed by Diane Eisner, AUSA.					
1-18/77	Before MISHLER, CH. J.- Case called. Motion for an order of expungement of his arrest record in connection with the above entitle action. Motion submitted. Decision reserved.					
3.10.77	By Mishler, J.- Memorandum of Decision and Order filed that deft's. motion for an order expunging his arrest records and directing the return of the fingerprints and photographs taken is denied.					
4-1-77	By Mishler, Ch J - Order filed denying motion for reduction of sentence imposed and letter from deft filed received from Chambers (application for reduction of sentence) Copy mailed to the deft as instructed.					
4.21.77	Notice of Appeal filed.					
4.21.77	Certified Copy of docket entries and duplicate of Notice of Appeal mailed to the Court of Appeals.					

A TRUE COPY
ATTEST
DATED April 26, 1977
LEWIS ORGEL
CLERK
BY [Signature]
DEPUTY CLERK

FINE AND RESTITUTION PAYMENTS					
DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

76 CR 476

UNITED STATES OF AMERICA

-against-

LEONARD FORTGANG and
ZALMON SCHNITZER,

Defendants.

FILED
U.S. DISTRICT COURT
JUL 27 1976
Cr. No. 76-13, U.S.C., §5201(b),
236

TIME A.M.
P.M.
L - - - - -

THE GRAND JURY CHARGES:

COUNT ONE

Commencing on or before the 5th day of November 1975 and continuing up to and including the 10th day of March 1976, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants LEONARD FORTGANG and ZALMON SCHNITZER did knowingly and wilfully agree, combine and conspire to defraud the United States and an agency thereof, the Federal Insurance Administration, Department of Housing and Urban Development, by aiding to obtain the payment of a false, fictitious, and fraudulent claim under the Federal Crime Insurance Program.

It was part of said conspiracy that the defendants LEONARD FORTGANG and ZALMON SCHNITZER would and did present a claim to the Federal Insurance Administration, Department of Housing and Urban Development, for payment under the Federal Crime Insurance Program, knowing that such claim was false, fictitious, and fraudulent and that they were not entitled to such payment.

In furtherance of said unlawful conspiracy and for the purpose of effecting the objectives thereof, the defendants LEONARD FORTGANG and ZALMON SCHNITZER committed the following:

①

①

B

OVERT ACTS

1) On or about the 5th day of November 1975, the defendant ZALMON SCHNITZER signed a notice and proof of loss in the Eastern District of New York.

2) On or about the 10th day of March 1976, the defendants LEONARD FORTGANG and ZALMON SCHNITZER met and conferred in the Eastern District of New York. (Title 18, United States Code, Section 236)

COUNT TWO

On or about the 10th day of March 1976, within the Eastern District of New York, the defendant LEONARD FORTGANG corruptly did, directly and indirectly, give a sum of money to Richard J. Scott, who was then and there a public official employed by the Department of Housing and Urban Development as an investigator for the Regional Inspector General, with intent to influence an official act of the said Richard J. Scott in connection with the investigation of an insurance claim submitted under the Federal Crime Insurance Program. (Title 18, United States Code, Section 201(b))

A TRUE BILL

Charles J. Belman
Deputy FOREMAN

David G. Trager
DAVID G. TRAGER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

VS

ZALMON SCHNITZER

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.
★ JAN 10 1977 ★
TIME A.M.
P.M.

ORDER OF DISMISSAL

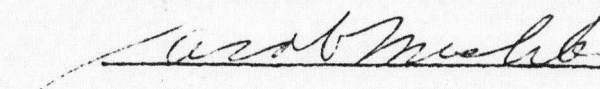
76 CR 476

H'FILED

The United States Attorney having appeared in open
court and having moved orally to dismiss the indictment
herein, and the said motion having been granted, it is

Ordered that the indictment is hereby dismissed
against the above named defendant(s).

DATED: Brooklyn, New York
January 7th, 1977


UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILED
IN CLERK'S OFFICE
S. DISTRICT COURT E.D. N.Y.

★ FEB 10 1977 ★
TIME A.M. _____ P.M. _____

-----X
UNITED STATES OF AMERICA, :
-against- : NOTICE OF MOTION
ZALMON SCHNITZER, : 76 CR 476
Defendant. :
-----X

S I R S :

PLEASE TAKE NOTICE, that upon the annexed affidavit of EDWARD J. KELLY, ESQ., duly sworn to this 9th day of February 1977, and upon all the papers and proceedings heretofore and herein, the undersigned, on behalf of ZALMON SCHNITZER, will move this Court, before the Honorable JACOB MISHLER, Chief Judge of the United States District Court for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York, on February 18, 1977 at 10:00 A.M., or as soon thereafter as counsel may be heard, for an order of expungement of his arrest record in connection with the above entitled action, and for the return of all photographs and fingerprints taken in connection therewith, upon the ground that the indictment herein was dismissed as to the defendant by an order of this Court on January 7, 1977, following a motion made orally in open court by the United States of America; and for such other and further relief as to the Court may seem just and proper.

DATED: BROOKLYN, NEW YORK
February 9, 1977.

Yours, etc.,

WILLIAM J. GALLAGHER, ESQ.,
FEDERAL DEFENDER SERVICES UNIT
THE LEGAL AID SOCIETY
26 Court Street, Room 701
Brooklyn, New York

TO: DAVID G. TRAGER, ESQ.,
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

CLERK, UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

(9)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA, :
 : AFFIDAVIT
 -against- : 76 CR 476
ZALMON SCHNITZER, :
 :
 Defendant. :
-----X

STATE OF NEW YORK)
COUNTY OF KINGS) SS:

EDWARD J. KELLY, being duly sworn, deposes and says:

1. He is an attorney associated with WILLIAM J. GALLAGHER, ESQ., Federal Defender Services Unit/The Legal Aid Society, the attorney of record assigned to represent the defendant herein, ZALMON SCHNITZER.

2. This affidavit is submitted in support of a motion on behalf of the defendant, for an order directing the expungement of his arrest record and for the return of all photographs and fingerprints taken in connection therewith by the Department of Justice through the United States Marshal and the Federal Bureau of Investigation. The relief sought here also includes a direction by the Court that the Department of Justice request the return of such arrest record, fingerprints and photographs from any other state or federal agencies to which they may have disseminated the same; and for such other and further relief as to the Court may seem just and proper.

3. The history of this case is as follows: In a two count indictment, filed July 27, 1976, the defendant, ZALMON SCHNITZER and another, LEONARD FORTGANG, were charged with conspiring to defraud the government by the filing of a false claim under the Federal Crime Insurance Program (Count One). In Count Two, Mr. Fortgang alone was charged with the bribery

of a government official in connection with this false claim. (Copy of Indictment attached). By virtue of this charge against him, the defendant SCHNITZER was routinely processed by the Federal Bureau of Investigation and the United States Marshal's Service: records were made and fingerprints and photographs taken of him. This office was assigned to represent the defendant on August 11, 1976, at which time the defendant entered a not guilty plea.

4. On November 19, 1976, following a guilty plea to Count Two of the Indictment, the defendant FORTGANG received a suspended sentence, with probation for one year, and Count One - the conspiracy count - was dismissed as to him. (Copy of judgment attached). Finally, after much delay, occasioned by the government's consideration of filing a superseding indictment against the defendant SCHNITZER, and after there had been a number of requests by both the defendant and his then counsel, Michael Asen, for a speedy disposition of the case, the government moved orally to dismiss the indictment on January 7, 1977 and an order of dismissal as to the defendant was entered on that day. (Copy of Dismissal attached)

5. Defendant SCHNITZER now seeks to have the stigma occasioned by his indictment erased and to be returned to the status he enjoyed before. Since he came to this country twenty-five years ago from Germany, he has never been convicted of any crime. He is a naturalized American citizen and has for many years been a rabbinical student at the United Talmudic Academy, 82 Lee Avenue, Brooklyn, New York. The goal of the rabbinate, which he is seeking, makes the existence of a criminal record particularly poignant for him. There is, therefore, good reason to remove from the defendant the onus of this criminal record.

6. There is also precedent for the equitable action the defendant seeks here. Although expressed in a rather different context, the court in Sullivan v. Murphy, 478 F.2nd 938, 968 (D.C. Cir 1973) stated:

The principle is well established that a court may order the expungement of records, including arrest records, when that remedy is necessary and appropriate in order to preserve basic legal rights...While various cases are distinguishable on the facts, they illustrate the vitality of the principle.

Additional support for the remedy sought by the defendant is found in the recent action of the Legislature of the State of New York whereby, effective September 1, 1976, the Criminal Procedure Law was amended to provide that, where there has been a favorable termination of an action against the accused, fingerprints and photographs are to be returned to the defendant, records of the proceedings sealed etc., (CPL §160.50 et seq.; Copy of statute attached). This enlightened action by the State of New York should be persuasive because it recognizes the damage that may have been done to the legally innocent by the existence and maintenance of such records and responds to the valid outcry in our society against the massive proliferation and dissemination of records about our citizens which invades their basic right to privacy.

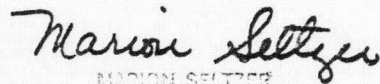
7. The relief, then, sought by the defendant here would be in the interests of justice because supported by reason, law and the mind of our times.

8. WHEREFORE, it is respectfully urged that an order be entered, directing the United States Department of Justice, through the United States Marshal's Service and the Federal Bureau of Investigation, to expunge any and all arrest records of the defendant, ZALMON SCHNITZER, and to return to him any and

all fingerprints and photographs taken in connection therewith;
and, further, that the said Department of Justice through its
aforementioned agencies request the return of such records,
photographs and fingerprints from whatever other agencies,
state or federal, to which they may have been disseminated;
and for such other and further relief as to the Court may seem
just and proper.


EDWARD J. KELLY

Sworn to before me this
9th day of February, 1977.


MARION SELTZER
Notary Public, State of New York
No. 0147075
Qualified in Kings County
Expiration Date March 03, 1978

CIS:DRE:sr
770268

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

ZALMON SCHNITZER,

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.
★ Defendant. FEB 17 1977 -x★

AFFIDAVIT IN
OPPOSITION TO MOTION
TO EXPUNGE

Crim. No. 76 CR 476

STATE OF NEW YORK)

TIME A.M. P.M.
) ss.:
)

COUNTY OF KINGS)

DIANE R. EISNER, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the Office of the United States Attorney for the Eastern District of New York, and am familiar with the facts of this case.

2. This affidavit is submitted in opposition to defendant's motion for an order directing the expungement of his arrest record, and for the return of all photographs and fingerprints taken in connection with the above entitled action.

3. We note initially that defendant has brought this motion in the context of the criminal proceeding which has terminated. The remedy sought, expungement, appears to place this action in the nature of mandamus. Since defendant has not named or served a federal respondent, nor has he filed a summons and complaint, nor paid a docketing fee, it would appear that this Court does not have jurisdiction to entertain this motion. See, United States v. Huss, 520 F.2d 598, 604-605 (2d Cir. 1975). Indeed, this very problem was specifically recognized in United States v. Dooley, 364 F. Supp. 75, 76 fn. 1 (E.D. Pa., (1973), but that court in the interest of judicial economy, entertained and summarily denied the motion.

4. In the event that this Court finds that it has jurisdiction to entertain the instant motion, we submit that the motion should be summarily denied for the reasons set forth below.

5. After presentation of testimony to a duly constituted Grand Jury, the indictment underlying the captioned action was returned on July 27, 1976. One count of the indictment charged defendant, along with one Leonard Fortgang, with conspiracy to defraud the United States and an agency thereof, the Federal Insurance Administration, Department of Housing and Urban Development, by aiding to obtain the payment of a false, fictitious, and fraudulent claim under the Federal Crime Insurance Program. A second count in the indictment charged Mr. Fortgang alone with bribery. The validity of this indictment has never been and is not now challenged by defendant.

6. On August 10, 1976, defendant appeared at the offices of the United States Attorney, Eastern District of New York, in order to surrender to the Federal Bureau of Investigation. After being advised that he was under arrest, defendant, who spoke in Yiddish, advised through an interpreter that he would not make any statements until he spoke with an attorney. At this time, the interview was terminated. Defendant was arraigned before this Court on the same date, pled not guilty, and was released after he and his father co-signed a \$10,000 personal recognizance bond. Prior to his release, however, defendant was fingerprinted and photographed by the United States Marshal, Eastern District of New York.

7. On September 13, 1976, Leonard Fortgang pled guilty to the second count in the indictment. Shortly thereafter, this office decided not to pursue the criminal prosecution of defendant, but rather, to refer for civil

prosecution the matter of defendant's alleged false claim. On January 7, 1977, the indictment against defendant was dismissed.

8. On February 10, 1977, defendant served upon the office of the United States Attorney the instant motion seeking expungement of his arrest record and return of all photographs and fingerprints in the possession of the Department of Justice taken in connection with this case. Defendant does not allege that his arrest was without probable cause or in any way unlawful, nor does he allege that the records will be misused or that he will in fact suffer any damage by their retention.

9. Section 534 of Title 28 of the United States Code contains a directive to the Attorney General to acquire and preserve criminal identification materials and records, United States v. Rosen, 343 F. Supp. 804, 806 (S.D.N.Y., 1972), and where the arrest was not unlawful, the record of the arrest was not the "fruit" of an unlawful seizure, and no other statute directs the return of such arrest records, they should be retained, even where a defendant has been acquitted of the charges. United States v. Rosen, supra, at p. 806, 808.

10. It must be recognized that there is a compelling public need for an effective and workable criminal identification procedure.

"To permit law enforcement officials to retain arrest records, photographs or fingerprints promotes more effective law enforcement. Allowing the police broad discretion in retaining arrest records enables them to utilize more efficiently their facilities for combating crime. Moreover, arrest records may be vital in curbing the growth of crime."

United States v. Rosen, supra, at p. 809. Moreover, the practical administrative problems which would be created by

a decision allowing expungement in any case which terminates favorably to the accused renders such relief a question which is better dealt with by Congress than the judiciary. United States v. Dooley, 364 F. Supp. 75, 79 (E.D. Pa., 1973).

11. The Government knows of no cases in which expungement was granted in the absence of extraordinary circumstances such as a lack of probable cause for the arrest, or a finding that the arrest was for harassment purposes only. The authorities are unanimous that in a normal case, such as that at bar, expungement should not be granted. United States v. Linn, 513 F.2d 925 (10th Cir. 1975); United States v. Rosen, *supra*; United States v. Dooley, *supra*; United States v. Seasholtz, 376 F. Supp. 1288 (N.D. Okl., 1974); Shadd v. United States, 389 F. Supp. 721 (W.D. Pa., 1975).

12. In the instant case, defendant's arrest was lawful, pursuant to an indictment handed down by a duly constituted Grand Jury. Defendant has never challenged the validity of this indictment. Moreover, defendant has not alleged that the retention of his records will in any way prejudice him other than to claim generally that the problem is "poignant" for one seeking the rabbinate. He does not claim to have experienced harassment of any kind, nor has a contention been made that he has lost job opportunities or suffered any untoward results by reason of the retention of the records.

13. In United States v. Linn, *supra*, the Court recognized the need to balance an individual's right to privacy with the government's need to maintain extensive records to aid in law enforcement. The Court concluded that the power to expunge "is a narrow one, and should not be routinely used whenever a criminal prosecution ends in

an acquittal, but should be reserved for the unusual or extreme case." 513 F.2d at 927.

14. The instant case presents no facts which would render it in any way "unique" in contrast with other criminal proceedings which have terminated favorably to the accused. In the absence of such a showing, defendant is not entitled to have his photographs or fingerprints returned, nor his arrest record expunged.

WHEREFORE, it is respectfully submitted that the motion should be denied.

Diane R. Eisner
DIANE R. EISNER
Assistant U. S. Attorney

Sworn to before me this
17th day of February, 1977.

Stella B. Magier
STELLA B. MAGIER
Notary Public, State of New York
No. 214501004
Qualified in Kings County
Commission Expires March 30, 1977

FILED
IN CLERK'S OFFICE
J. S. DISTRICT COURT E.D. N.Y.

★ MAR 10 1977 ★

TIME A.M. _____
P.M. _____

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

76 CR 476

UNITED STATES OF AMERICA

-against-

Memorandum of Decision
and Order

ZALMON SCHNITZER,

Defendant.

March 9, 1977

A P P E A R A N C E S :

HONORABLE DAVID G. TRAGER
UNITED STATES ATTORNEY
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201
Of Counsel: Diane Eisner, Esq.

WILLIAM J. GALLAGHER, ESQ.
LEGAL AID SOCIETY
Federal Defenders Unit
Attorney for Defendant
26 Court Street
Brooklyn, New York 11201
Of Counsel: Edward Kelly, Esq.

MISHLER, CH. J.

On July 27, 1976, a federal grand jury re-
turned an indictment against defendant, Zalmon Schnitzer,
and one Leonard Fortgang, charging them with conspiring to
defraud the government by filing a false claim under the

(17)

Federal Crime Insurance Program. Count Two of the indictment charged Mr. Fortgang alone with the bribery of a government official in connection with the false claim. By virtue of the charges preferred, defendant was routinely processed by the Federal Bureau of Investigation and the United States Marshal for this district after his surrender; an arrest record was compiled and transmitted to state and local law enforcement authorities, and fingerprints as well as photographs were taken. On August 11, 1976, Schnitzer was arraigned on the indictment and a plea of not guilty was entered.

On November 19, 1976, Fortgang withdrew his plea of not guilty and plead guilty to Count Two of the indictment. At that time the government made known to the court its intention to file a superseding indictment against defendant Schnitzer. The government never followed through, however. It decided, rather, to civilly prosecute the matter of defendant's alleged false claim. On January 7, 1977, upon the government's oral motion, the court dismissed the pending indictment.

Defendant Schnitzer now seeks the entry of an order directing the expungement of his arrest record

and the return of any copies thereof that were transmitted to state and local authorities, as well as the return of the fingerprints and photographs taken.^{/1} The government opposes the motion.

Although there is no federal statutory authority mandating the return of arrest records, photographs and fingerprints after an acquittal or the dismissal of an indictment, it is within the inherent equity power of the court to enter an order of expungement. United States v. Linn, 513 F.2d 925, 927 (10th Cir.), cert. denied, 423 U.S. 836, 96 S.Ct. 63 (1975); Washington Mobilization Committee v. Cullinane, 400 F. Supp. 186, 217 (D.D.C. 1975). A balancing of interests between the individual's right to privacy and the government's need to maintain records in order to effectively conduct law enforcement activities will determine whether the power is exercised. United States v. Rosen, 343 F. Supp. 804, 806 (S.D.N.Y. 1972).

^{/1}

As the government suggests, the instant matter is more appropriately brought on as a separate civil action since the underlying criminal action is closed. See United States v. Dooley, 364 F. Supp. 75 (E.D. Pa. 1973). If presented in a civil context, however, it would still be assigned to this court as a related matter. Therefore, in the interests of judicial economy, we will treat the motion as ancillary to the criminal indictment.

Section 534 of Title 28 of the United States Code requires the Attorney General, United States v. Rosen, supra at 806, to acquire criminal identification materials and retain the records thereof.¹² The significance of arrest records lies in the information that can be subsequently gleaned from the preserved scriptures; they may well provide important investigatory leads or useful background information. United States v. Dooley, supra at 77. We are mindful of the fact that the abusive dissemination of such information can cause economic loss and injury to one's reputation. See gen. President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: Science and Technology 74-77 (1967). Yet the mere threat of such harm, in the absence of specific proof in a given case, does not warrant expungement.

¹²

Title 28 U.S.C. §534 provides in pertinent part:

(a) The Attorney General shall—

(1) acquire, collect, classify, and preserve identification, criminal identification, crime, and other records; and

(2) exchange these records with, and for official use of, authorized officials of the Federal Government, the States, cities and penal and other institutions.

Courts have been hesitant to order expungement of records in the absence of extraordinary circumstances. For example, unless it appears the arrest was without probable cause or there is a concrete showing that the retention of records is injurious, courts are not apt to exercise their equitable powers. United States v. Rosen, supra at 808; see also Farber v. Rochford, 407 F. Supp. 529 (N.D. Ill. 1975); United States v. Seasholtz, 376 F. Supp. 1288 (D. Okla. 1974); Shadd v. United States, 389 F. Supp. 721 (W.D.Pa. 1975), aff'd, 535 F.2d 1247 (3d Cir. 1976).

In the instant case, Schnitzer was lawfully arrested pursuant to an indictment handed down by the grand jury. Never was there a challenge to the validity of the accusatory instrument. While the criminal indictment was dismissed, the government continues to prosecute him civilly. The dismissal, since it is not an adjudication on the merits, does not necessarily mean the defendant is innocent of the charges; the government is free to continue criminal prosecution. United States v. Rosen, supra at 806 citing inter alia United States v. Chase, 372 F.2d 453, 463-464 (4th Cir. 1967). Moreover, defendant makes no particularized showing that the retention of his arrest record is in any way pre-

judicial; he makes only a generalized claim that it presents a "poignant" problem for one, such as he, who is studying for the rabbinate. It cannot be said that his privacy rights have been unnecessarily invaded. Herein, the interests of the government in effective law enforcement clearly outweigh those of the defendant.

Accordingly, for all of the reasons heretofore cited, defendant's motion for an order expunging his arrest records and directing the return of the fingerprints and photographs taken is denied, and it is

SO ORDERED.


U. S. D. J.

CERTIFICATE OF SERVICE

August 12, 1977

I hereby certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

Steven Lloyd Bernstein